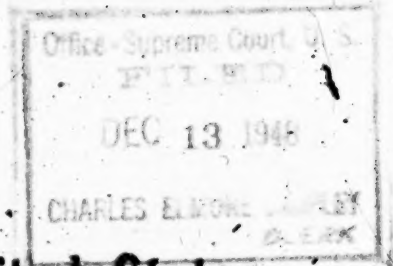


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IN THE

Supreme Court of the United States

October Term, 1948.

406

No. 406.

UNITED STATES OF AMERICA,

Petitioner,

v.

HARRY S. KNIGHT,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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**BRIEF OF RESPONDENT IN OPPOSITION TO
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**I. The Petition Sets Forth No Valid Ground for Granting
Writ of Certiorari.**

The petition for certiorari assigns no special and important reason for a review. It is not contended that (a) there is any conflict of decision between Circuit Courts of Appeals, or (b) an important question of federal law has been decided which has not been but should be settled by this Court, or (c) a federal question has been decided in a way probably in conflict with applicable decisions of this Court, or (d) there has been such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

On the contrary, what the petitioner really seeks is a re-reading and a re-analysis of the entire evidence with the expectation that this Court will disagree with the conclusion of the Court of Appeals that the evidence did not sustain the charges of the indictment. It is not the purpose of a certiorari to review such evidentiary disputes of no public importance.

2 *Brief of Respondent in Opposition to Petition*

The petition alleges that a writ of certiorari should be granted in order to correct a miscarriage of justice and remove a harmful bankruptcy precedent. Both grounds are based upon certain misconceptions of fact and law that government counsel have of necessity urged at every stage of the present cause in order to overcome their failure to prove the charges of the indictment. These misconceptions will be considered in the order of their appearance in the petition.

II. Misconceptions of Fact and Law in Petitioner's Statement of the Case.

The statement by petitioner contains the same three fallacious contentions which government counsel extensively argued in their briefs and at the oral argument before the Court of Appeals, and which were rejected in the majority opinion and were not accepted or otherwise relied upon in the minority opinion.

The first is that the purpose of the embezzlement charged was to provide funds for the payment of Donald Johnson. The second is that Maxi agreed to pay \$26,404.33 in cash for the accounts receivable and other loose assets of Central in addition to the \$17,000 in debenture bonds to be paid creditors in compromise of their claims. The third is that the \$3,000 paid by Maxi from its own treasury to Michael "individually and not as trustee" was a part of and belonged to the debtor's estate.

A. The jury rejected the theory that the successor trustee and his attorney embezzled property from the estate of the debtor, Central, in order to pay the acquitted Donald Johnson for their appointments.

The petition for certiorari states that Donald Johnson suggested to Michael and Reifsnyder that they should apply for appointments to his father, then a judge of the District Court, which they did (page 4); that subsequently, in consideration of the appointments, they evolved the plan of

taking care of Donald Johnson out of certain funds to be diverted from the estate (page 5); and that they eventually delivered to him \$2500 therefrom in cash (page 11). This was the basic theory of the prosecution and was predicated entirely upon the uncorroborated testimony (R. 27-35, 57-58, 147-148) of the discredited Michael, who pleaded guilty and was the Government's main witness (R. 154-158, 202-208, 232-254, 262-264).

However, on cross-examination Michael was forced to admit that he had never told respondent of the professed deal with Donald Johnson (R. 213-220, 269, 274-284). Both respondent and co-defendant Fenner denied knowledge of it (R. 469, 523, 601-604).

Certainly, this undisclosed and unbelieved motive or theory can have no present probative value with regard to the innocence or guilt of respondent. As Circuit Judge Maris aptly observed (R. 832):

" * * * The Jury, however, acquitted Johnson and the Government's theory as to the purpose of the transaction involving the \$3,000 and the receipt of the money by Johnson, therefore, falls out of the case . . . "

At the oral argument government counsel frankly conceded that by reason of his acquittal the Donald Johnson episode must no longer be considered (Certified Transcript, pages 67-68). It is indeed surprising that the petition for certiorari should resurrect this rejected motive or theory.

B. *Maxi did not agree to pay \$26,404.33 for the accounts receivable and other loose assets of Central.*

The petition for certiorari contends that under the "revised plan of reorganization" Maxi was to pay Central the value of its net current assets (pages 5-6); that on April 8, 1942 Michael, Reifsnyder and Respondent finally agreed upon the total figure of \$26,404.33 as the value of such assets (page 7); and that this sum was so paid and distributed at settlement (pages 10-11).

4 *Brief of Respondent in Opposition to Petition*

This fallacious contention is completely refuted by the documentary and oral proofs, which establish conclusively that Maxi never offered to buy or obligated itself to buy the accounts receivable and other loose assets of Central for the sum of \$26,404.33 or any other cash sum, and that the sole obligation of Maxi under the agreement between the parties as well as under the approved plan of reorganization was to pay \$17,000 in debenture bonds to creditors in compromise of their claims, and in addition to pay the expenses of the receivership and reorganization proceedings, as allowed by the District Court, to an amount not exceeding \$26,404.33.

The first offer by Maxi to take over Central is embodied in the January 29, 1942 letter from respondent to Reifsnyder (R. 42-46, 409-13, 696-700). It proposed that Maxi pay \$17,000 in cash for a clear and unencumbered title to the land, plant, machinery and equipment, and all assets of every kind and character "except accounts receivable, cash, goods in process, goods finished and raw material." It further proposed that the plant be kept in operation until taken over by the purchaser, and that at the same time the current assets be liquidated for the payment of expenses. It was calculated that the purchase price of \$17,000 would be sufficient to pay a dividend of 20% to bondholders and a dividend of 5 to 8% to unsecured creditors, and that the proceeds from the liquidation of the current assets would be more than sufficient to pay all expenses.

The January 29, 1942 offer by Maxi was not accepted by Michael and Reifsnyder because it was wholly impracticable for the trustee to liquidate the assets of Central and yet keep the plant in operation until the take-over (R. 450-451). In lieu thereof, Reifsnyder, by letter dated February 17, 1942 (R. 426-429, 715-718) forwarded a plan of reorganization which provided for the merger of Central with Maxi in pursuance of Chapter X of the Bankruptcy Act (R. 426-429, 715-718).

Respondent redrafted the plan to provide that the transfer of assets was to be as of January 1, 1942, and forwarded his redraft to Reifsnyder by letter dated February 23, 1942 and setting forth the changes (R: 431, 436-442, 719-724). Reifsnyder approved the changes save the insertion of January 1, 1942 as the transfer date, which date he rejected as troublous and not practical (R. 443-444). The plan provided that the trustee should pay in full in cash all costs, fees and expenses of the receivership and the reorganization proceedings. Inasmuch as Maxi was to receive everything when the transfer was made, Reifsnyder asked Maxi to pay these costs, fees and expenses so long as they did not exceed \$26,404.33 (R. 444-445, 505-506).

The redrafted plan was filed on February 27, 1942 as "proposal of revised plan of reorganization" (R. 61-66, 704-708). It was identical in form and substance with the redraft submitted by respondent to Reifsnyder on February 23, 1942 except for the omission of January 1, 1942 as the transfer date (R. 61-66, 436-442, 704-708, 719-724).

Paragraph 5 of the revised plan of reorganization provided that in pursuance of Chapter X of the Bankruptcy Act Central should merge with Maxi and that all assets should be transferred upon acceptance of the plan pursuant to law and compliance with the provisions thereof (R. 61-66, 704-708). Paragraphs 6 and 7 imposed the sole obligation on Maxi to issue general debenture bonds to secured creditors of Central, i. e., bondholders, in the amount of 20% of their holdings, and general debenture bonds to unsecured creditors in the amount of 5% of their allowed claims (R. 64, 707). The trustee under paragraphs 9 and 10 was required to pay in full in cash the costs, fees and expenses of the receivership and the reorganization proceedings (R. 65, 707-708).

The final order of confirmation of the revised plan of reorganization specified that the general debenture bonds of Maxi were to be turned over to the trustee and by him delivered to the secured and unsecured creditors of Cen-

tral, and that upon the receipt by the trustee of said bonds and upon payment of all administration costs and expenses, as allowed by the court (i. e. \$23,404.33) the trustee should transfer to Maxi all the assets, claims, patents, right, franchises, cash, receivables and property of Central (R. 689).

In directing that payment of all administration costs, fees and expenses was a condition precedent to the merger, the court order, unlike the reorganization plan, did not specify by whom they were to be paid. Consequently, they could be paid either by the trustee out of the assets of Central before the transfer as contemplated by the reorganization plan, or by Maxi with its own funds in accordance with the oral arrangement with Reifsnyder (R. 444-445, 505-506), in which event Maxi would receive all the assets of Central.

That Michael and Reifsnyder fully understood that the payment by Maxi of \$23,404.33 at settlement was solely for the purpose of taking care of the administration costs, fees and expenses and was not in payment for the accounts receivable and other loose assets is evidenced by the testimony of Michael on cross-examination, the uncontradicted testimony of respondent on direct and cross-examination, and the method of payment. Michael stated that under the final agreement between himself, Reifsnyder and respondent, Maxi was to pay \$17,000 in debenture bonds to take care of bondholders and creditors and the cash sum of \$25,892 (reduced by previous payments to the final sum of \$23,404.33) for costs of administration (R. 182, 196-197). Respondent confirmed this agreement and asserted that the cash sum paid by Maxi at settlement was solely to take care of administration costs, fees, and expenses and was not in payment for the accounts receivable and other loose assets of Central (R. 430-444, 449-452, 490-491, 495-501, 505-506). The several checks drawn by Maxi and delivered at settlement were payable to the persons named and in the amounts specified in the court order on fees and allowances filed April 20, 1942 (R. 690-696).

It thus appears that at no time in the negotiations was it ever contemplated that Maxi should purchase the accounts receivable and other loose assets for \$26,404.33 or any other cash sum. At the very outset, the initial proposal of January 29, 1942 called for a trustee's sale of only Central's fixed assets to Maxi for \$17,000 in cash. The accounts receivable and other loose assets were expressly excluded and were to be liquidated to provide the necessary funds for the payment of administration costs and expenses (R. 42-46, 409-413, 696-700). This proposal was discarded as impracticable.

The final, revised plan of reorganization, which was filed February 27, 1942 (R. 61-66, 704-708) and was confirmed April 17, 1942 (R. 687-690), provided for the merger of Central with Maxi in pursuance of Chapter X of the Bankruptcy Act. The sole obligation of Maxi under the reorganization was to issue debenture bonds in the amount of \$17,000 to secured and unsecured creditors of Central in compromise of their claims. The trustee was required to pay administration costs, fees and expenses as a condition precedent to the merger and transfer of assets. In discharge of that duty and in order to avoid the troublesome problem of liquidation during plant operation, the trustee orally arranged with respondent that Maxi would pay the administration costs, fees and expenses with its own moneys and thereupon receive all the assets of Central without deduction.

The foregoing documentary and oral evidence is reviewed at length in the printed majority opinion and led Circuit Judge Maris to the necessary conclusion that the sole agreement of Maxi was to pay \$17,000 in debenture bonds to creditors in compromise of their claims and in addition to pay receivership and reorganization expenses "as allowed by the District Court, to an amount not exceeding \$26,404.33" (R. 832-836). This necessary conclusion is not questioned in the dissenting opinion by Circuit Judge Kalodner.

C. *The \$3,000 payment by Maxi to Michael individually was not part of and did not belong to the debtor's estate.*

The petition for certiorari claims that the \$3,000 indirectly paid, Michael came out of the agreed price of \$26,404.33 for the accounts receivable and other loose assets of Central (pages 7-8), that this reduction in the purchase price was fraudulently concealed by a corresponding decrease in the accounts receivable from \$23,404.33 to \$20,404.33 (pages 8-9), and that the Court of Appeals erred in concluding that (a) the \$3,000 belonged to Maxi, (b) was a purely voluntary payment out of its own funds, upon which the reorganized estate had no claim, and (c) did not constitute an embezzlement or unlawful transfer in violation of Section 29 (a) of the Bankruptcy Act (pages 13-14). This claim forms the basis of petitioner's specification of errors to be urged (page 13) and reasons for granting the writ (pages 13-15).

The errors of fact and law underlying this unsound claim are manifold and manifest. First, Maxi never agreed to pay \$26,404.33 or any other cash sum for the accounts receivable and other loose assets of Central. Its sole obligation was to pay \$17,000 in debenture bonds to take care of creditors under the compromise, and in addition to pay in cash receivership and reorganization expenses, as allowed by the District Court to an amount not exceeding \$26,404.33. That obligation was discharged in full (pp. 3-7 ante):

The documentary evidence corroborates in every particular the uncontradicted testimony of respondent that the revised plan of reorganization was in fact and law a merger authorized by and effected under Chapter X of the Bankruptcy Act (R. 430-444, 439-452, 490-491, 495-501, 505-506). The plan did not value Central's assets, because such a valuation was neither necessary nor material to reorganization by merger."

In order to sustain the charges in the indictment, the Government sought to establish that the take-over of Central by Maxi was not a merger but actually a sale. It

thereby hoped to overcome the prosecution's failure to show the existence of any cash and any accounts receivable at settlement on April 24, 1942 by creating a present, contractual right in the trustee to receive from Maxi moneys for accounts receivable that had formerly existed, which moneys might be the subject of the charged embezzlement and unlawful transfer.

The use of the postulatory figure of \$26,404.33 as a yardstick to measure the maximum amount of receivership and reorganization expenses that Maxi was obligated to pay arose in this way. An account had been stated as of December 31, 1941, which showed that if secured and unsecured creditors accepted \$17,000 for their claims, the net value placed upon the assets passing through the hands of the trustee would in general approximate the \$26,404.33 figure. Stockholders had no rights because of Central's insolvency. The trustee consequently thought that he could properly ask the court to award for administration expenses a sum equal to what had passed through his hands.

Second, the \$3,000 paid Michael came from Maxi's own treasury and never belonged to or formed a part of the debtor's estate. The prosecution proved that it came from Maxi's bank account (R. 103, 501). The indictment concedes that this \$3,000 never came into Michael's charge as trustee. Not only does it expressly charge that it was paid to him "individually," but even emphasizes that it was paid to him "not as trustee" (R. 9).

The evidence negated the existence of any cash in the debtor's estate on April 24, 1942. The Dobson Report as of December 31, 1941, as well as the report of the successor trustee of April 8, 1942, showed cash of \$133.90 (R. 90-92, 161). The evidence further showed that no cash was turned over by the trustee to Maxi on April 24, 1942. As a consequence, there was no evidence of any cash in or belonging to the debtor's estate that could be the subject of any embezzlement.

Thirdly, the evidence failed to show the existence of any accounts receivable at settlement for transfer to Maxi. The prosecution's entire case rested upon the supposed existence of \$23,534 of accounts receivable on April 24, 1942. When the prosecution failed to show that on April 24, 1942, any accounts receivable existed but did affirmatively prove that no accounts receivable were the subject of the bill of sale then delivered to Maxi, the Government's case was completely at an end. The charge was that \$3,000 of accounts receivable were omitted from the records and unlawfully transferred on April 24, 1942. The burden was on the Government to prove this charge. That burden was never met.

The Government's own witness testified that he had a firm of certified public accountants audit the books of the debtor estate every month (R. 87). Thus the Government was in a position to show if any accounts receivable were in existence on April 24, 1942. The Dobson audit as of December 31, 1941, which the Government offered in evidence (R. 87-89), listed \$23,534 of accounts receivable as then existent. Inasmuch as all the assets of Central were awarded to Maxi under the reorganization merger, any accounts receivable existing at the transfer date of April 24, 1942 should have been included in the bill of sale.

The prosecution attempted to show that from the accounts receivable as of December 31, 1941, in the aggregate amount of \$23,534, the bookkeeping figure of \$3,000 was to be deducted, thus leaving the suppositive figure of \$20,534 as the accounts receivable to be transferred under the final decree of confirmation of the designated plan of reorganization by the trustee to Maxi (R. 80-83). In contradiction thereof, the testimony of the Government affirmatively showed that out of the listed \$23,534 of accounts receivable as of December 31, 1941, accounts receivable in the amount of at least \$12,283.67 had already been assigned to the Catawissa National Bank, so that at that time there remained only the conjectural \$10,251 of accounts receivable

as the property of the debtor estate that could possibly be transferred by its trustee to Maxi in accordance with the final decree of confirmation (R. 160-163, 169).

The proofs admittedly showed that included in the accounts receivable of \$23,534 as of December 31, 1941, was an account of Maxi in the sum of \$3,086 which was paid on January 26, 1942, by check of Maxi to the debtor, thereby necessarily reducing the accounts receivable to \$20,448 (R. 163, 169-171, 473-474, 549-550). This was substantially the amount set forth in the trustee's report of April 14, 1942. (R. 90-92).

The Government sought to create the conjectural impression that the \$23,534 of accounts receivable existent as of December 31, 1941, and the \$3,000 payment by Maxi would appear as cash at the settlement on April 24, 1942, or else would appear in the form of new accounts receivable (R. 197-198). This is the purest conjecture. Moreover, the Government's own witness stated that the \$3,000 was at most a theoretical bookkeeping figure (R. 93-94, 199).

Fourthly, Government counsel freely admitted at the oral argument that there was no proof of the existence of accounts receivable and other loose assets in the sum of \$26,404.33 at the time of settlement under the reorganization plan. The following colloquy between Circuit Judge Maris and Government counsel at the oral argument contains the admission that there were not \$26,404.33 of book accounts and book assets for transfer on April 24, 1942 (Certified Transcript p. 62):

"Judge Maris: Well, it is perfectly obvious that there were not \$26,404 worth of assets at that time in that form. You, of course, concede that?"

"Mr. Brooks: That is correct.

"Judge Maris: That is a figure that has been agreed upon.

"Mr. Brooks: Reasonably, yes.

"Judge Maris: They would take what there was there, and that was the limit they had put.

"Mr. Brooks: That is right.

"Judge Maris: It might be more, it might be less, depending upon the course of the transactions of the trustee in the meantime, the way he carried on the business, whether he lost or gained."

Fifthly, Government counsel also conceded at the oral argument that Maxi alone owned and had any right in the \$3,000 paid Michael. Counsel for respondent had previously pointed out that the only obligation of Maxi was to pay the \$23,404.33, the sum actually allowed by the District Court for receivership and reorganization expenses, that Maxi's obligation to pay expenses not exceeding \$26,404.33 was conditioned upon their specific allowance by the District Court and that, therefore, had Maxi paid the maximum amount, the \$3,000 difference between it and the allowed \$23,404.33 would have been turned back to Maxi as a part of Central's assets. In other words, if the District Court had allowed but \$10,000 for expenses, Maxi would have been obligated to pay that sum and no more (Certified Transcript pp. 10-16).

In reply thereto, Government counsel admitted to Circuit Judge Maris that the \$3,000 paid Michael belonged to Maxi and that if Maxi had paid the maximum amount of \$26,404.33 the \$3,000 excess would have gone to Maxi together with all the other assets of Central (Certified Transcript pp. 65-67):

"Judge Maris: It seems to me that the great hurdle you have to get over is that this plan admittedly, of course, from your standpoint, provided for all the creditors in a certain fixed amount. They were to get so much in the way of percentage on their claims; the stockholders got nothing.

"Mr. Brooks: Correct.

"Judge Maris: So there was nobody else interested except the purchaser and the officers of the court who were looking to fees and were entitled to fees in some instances.

"Mr. Brooks: That is right.

"Judge Maris: Suppose they had \$26,000, and Judge Johnson cutting allowances everywhere said, 'I will only give you \$23,000; that is enough for you'—what would have happened to the \$3,000?

"Mr. Brooks: I think personally it would have gone with all the other assets to Maxi.

"Judge Maris: In other words, they would pay far more than they were required to Maxi.

"Mr. Brooks: That is right. That is the way I look at it.

"Judge Maris: Well, isn't that the theory? You are both in accord on that. That is just what Mr. McCracken argues. He says that they were just obligated to pay whatever the allowances were.

"Mr. Brooks: Well, that was the defense that the appellant offered at the time.

"Judge Maris: I know, but taking the defense or not, just on the facts as you understand them, what else, who else, would have had a claim on this \$3,000? Who could have gotten the money? Assuming that it was not taken out as you charge here, it certainly was taken out in a secret sort of way and by round about circulation—no doubt about that—is there anybody else who could come forward and say 'Well, my money was taken here'?

"Mr. Brooks: No, Your Honor, because everybody was settled with, and I think it would have gone to Maxi like all the other assets. I cannot see any other way.

"Judge Maris: I was wondering about that myself, and that being so, it is pretty hard to see where the Bankruptcy Act or the bankruptcy administration was involved."

The consequences of these two frank admissions by Government counsel (based as they were explicitly upon

the evidence in the case), are far reaching. They negative irrevocably the oft repeated charge in the petition that \$3,000 of the assets of the debtor's estate were embezzled and dissipated. They render moot any discussion of the scope and intent of Section 29 (a) of the Bankruptcy Act. They deny any right of possession in the trustee to the \$3,000 paid Michael individually by Maxi. They corroborated the position of respondent that the \$3,000 belonged to Maxi, and that its payment by Maxi to Michael was voluntary.

The foregoing admissions of Government counsel to the Court of Appeals are binding and may not be repudiated in this Court. See *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692 (1945) (C. C. A. 9) at pages 694-695.

Sixthly, the District Court in limiting receivership and reorganization expenses to \$23,404.33 in its order of April 24, 1942 (R. 92-97) did not rely upon and was not misled by the suppositive bookkeeping figure for the accounts receivable, as Government counsel conjecturally assert and the Court of Appeals erroneously assumed (R. 835). On the contrary, the evidence is uncontradicted that prior to the filing on April 14, 1942, of the "Report of Successor Trustee" (R. 90-92), Michael and Reifsnnyder called on respondent at his Sunbury office on April 8, 1942. Reifsnnyder stated that he had been present at a meeting in the office of Special Master Crolly at which fees were generally talked over; that from that conversation and other information he had he knew that fees, costs and allowances would be, as near as he could calculate, about \$3,000 less than the maximum which Maxi had agreed to pay; and that Michael and he would have to take less money for their fees than they had expected to receive (R. 462-463, 563-564).

Anent this Report, it should be noted that respondent had nothing to do with its preparation (R. 493). He had no reason to expect such a report would be filed, as Chapter X did not require it (R. 542). He did not see the Report until three months later (R. 493).

Finally, in reviewing the foregoing proofs, the majority opinion correctly observed (R. 834, 835, 836):

“ . . . It was evidently thought, and rightly so, as events turned out, that the court would limit the allowances to the figure thus reported, in which case the Maxi Company would be able to pay Michael the \$3,000 requested by him without exceeding the total amount which it had originally agreed to pay. . . . ”

“ The question for decision is whether these facts support the charges made in the indictment that Michael appropriated to his own use \$3,000 of funds belonging to the estate of the Forging Company and that in connection therewith he unlawfully transferred \$3,000 of accounts receivable of the Forging Company to the Maxi Company. We think the answer must be in the negative . . . ”

“ . . . But since the court did not in fact make allowances in excess of \$23,404.33, the Maxi Company's obligation under the plan to pay the expenses was limited to that amount and its payment to Michael through Fenner of an additional \$3,000 was a purely voluntary payment out of its own funds of a sum upon which the estate of the Forging Company had no claim.

“ What has been said applies equally to the charge in the second count of the indictment that \$3,000 of accounts receivable were transferred without consideration. The fact is, as we have already pointed out, that the figure in question involved the amount of accounts receivable on December 31, 1941. There is evidence that most, if not all, of those accounts receivable were collected between December 31, 1941 and April 24, 1942 and there is no evidence as to the amount of accounts receivable actually transferred to the Maxi Company on the latter date. But whatever they were,

the Maxi Company was entitled under the plan of reorganization to receive them and it did receive them along with all the other assets of the Forging Company. The sole consideration under the plan which the Maxi Company was obligated to pay for all of the assets of the Forging Company which it received, including the accounts receivable, was the issuance by it to the creditors of the Forging Company of its debenture bonds in the sum of \$17,000 and its payment of the expenses of administration as allowed by the district court. We have seen that this consideration was paid in full by the Maxi Company."

III. The Unsound Reasoning of Petitioner's Argument.

Most, if not all, of the fallacious arguments advanced by petitioner as reasons for granting a writ of certiorari (pages 14-21) are founded upon the three basic misconceptions of fact and law, above discussed and answered (pp. 3-16 ante).

A. Petitioner's first reason for granting writ.

Petitioner's contention (pages 15-17) that Maxi was to pay \$26,404.33 for Central's net current assets and that the Court of Appeals erred in not so finding has already been refuted (pp. 3-7 ante). Upon this disproved contention petitioner does and must base its case, because otherwise there could not possibly be any funds of the debtor's estate to embezzle or unlawfully transfer. This contention is in derogation of the revised plan of reorganization, which creditors accepted and the court approved, and which was fully carried out. It is at variance with the charges made in the indictment.

B. Petitioner's second reason for granting writ.

Government counsel in the trial court and to the jury argued that but for the \$3,000 payment there would have

been much more money for creditors and "perhaps for the poor stockholders" (R. 745). During the oral argument in the Court of Appeals, they abandoned this contention and admitted that Maxi would have alone been entitled to the \$3,000 because Central's insolvency barred stockholders from participating in the reorganization, and because the creditors of Central had accepted a compromise settlement of their claims (pp. 12-13 ante). They now repudiate their admission and seek to assert, for the first time, a hypothetical claim on behalf of undisclosed and unknown dissenting creditors. They forget that the vote to approve the plan was almost unanimous (R. 453) and seek to create the unjustified impression that scarcely more than the requisite two-thirds consented to the plan.

Government counsel also contend for the first time that the beneficiaries under the court order fixing administration expenses would have a higher claim to the \$3,000 than Maxi. They ignore the uncontradicted evidence that the amount had been fixed prior to the filing of the report of the successor trustee, and found their contention upon the conjecture that greater allowances would have been granted if the \$3,000 had been made known to the court.

Both claims are contrary to the proven facts and rest upon the untenable position that Maxi was obligated to pay the \$3,000 and that the \$3,000 belonged to and formed a part of the debtor's estate (pp. 8-16 ante).

C. Petitioner's third reason for granting writ.

Government counsel attack the defense version of the payment of the \$3,000 (R. 463-468, 563-564, 569) as "incredible" and insist that Michael's testimony in regard thereto was "candid, consistent and documented." Although counsel for respondent believe that the defense version of the \$3,000 payment was convincingly proved, yet the issue of comparative credibility was resolved against Michael by the jury, when they acquitted Donald Johnson.

The real issue is who owned the \$3,000 and not why was it paid. The Court of Appeals held that the evidence conclusively showed it belonged to Maxi and formed no part of the debtor's estate (R. 835). The inevitable conclusion from this finding had to be that the prosecution had failed to prove the charges made in the indictment (R. 836).

The closing contention of Government counsel (pages 20-21) that the decision of the Court of Appeals establishes an easy means of embezzling from bankrupt estates and sets a harmful precedent arises from an inexplicable misconstruction of the majority opinion. Circuit Judge Maris unequivocally stated that the sole question before the appellate court was whether or not respondent aided and abetted Michael to violate Section 29 (a) of the Bankruptcy Act in the manner described in the indictment (R. 835). He answered this question in the negative, when he concluded that the evidence did not support "the charges made in the indictment that Michael appropriated to his own use \$3,000 of funds belonging to the estate of the Forging Company and that in connection therewith he unlawfully transferred \$3,000 of accounts receivable of the Forging Company to the Maxi Company" (R. 834-835). The majority opinion may not conceivably be distorted into a precedent permitting embezzlement and misappropriation from a bankruptcy estate or condoning any violation of Section 29 (a).

IV. Conclusion.

For the several reasons above stated, it is respectfully submitted that the petition for certiorari is without merit and should be denied. The petition assigns no special and important reason for a review. The issues it seeks to raise are evidentiary in character and without public importance. They have been fully reviewed by the Court of Appeals. Their reconsideration by this Court is neither required nor desirable.

It is further respectfully submitted that the only miscarriage of justice in the present case was the conviction of respondent on the charge of abetting the trustee, Michael, in embezzling property of the debtor's estate and conspiring to do so. At the oral argument before the Court of Appeals, government counsel professed an inability to reconcile the acquittal of Donald Johnson, against whom the prosecution was primarily directed, with the conviction of respondent (Certified Transcript pp. 57-59). And yet government counsel now refuse to recognize that the bottom dropped out of the present case when the jury rejected the basic theory of the prosecution and acquitted Donald Johnson, whom they claimed was the sole author of and beneficiary under the alleged conspiracy to embezzle and misappropriate.

Finally, it is also respectfully submitted that the majority opinion in nowise condones, permits or fosters an embezzlement or misappropriation of funds of a debtor's estate in reorganization. Nor may that opinion be misconstrued in the manner petitioner suggests in an effort to distort it into a harmful precedent inviting covinous and conspiratory violations of Section 29 (a) of the Bankruptcy Act.

Respectfully submitted,

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